Confidential

App. F. IX-4

Previous References

193 .

File No. 157

Serial Nos. 1-2

Later References

67

General and Revenue Secretariat.

PRESERVED

Serial Nos.

Part B for

SUBJECT.

Mr: B. Nagappas case.

Mr: B. Nagappa's case and the question of privilege

— Law — B

1st 2nd

General and Revenue Secretariat. | File No. of 192

Serial No.

The certified copy of the Mayte's order was received from the C-Secretariat on 15.1.29. A typed copy is also put up for perusal & reference.

I have put up a typed note embodying the legal opinion on the subject.

If it is decided that Govt. need not take up the matter to the High Court, the case has to be communicated to Mrs Nagappa intimating that matter has to pursue his own remedies. The case has been adjourned to the 21st inst, and Mrs Nagappa has written a letter stating that a stay order has to be obtained from the High Court

No file containing the G.O. of 6.12.28 is also put up.

Subd for orders

3 Hon Members

D 1/1/29

I have also discussed this question with the Advocate and he holds opinion that the Mayte's order is correct as, I understand, the following grounds:—

1. The presence of a third party does not necessarily debar from the employ of communications. (Emp. digest 22 p 395).

NOTE—Contn. Sheet.

WD 01714—GPB—30,000—18-4-28

General and Revenue Secretariat. | File No. of 192 .

Serial No.

2. When the enquiry in camera proceedings was pressed, enquiry evidence about the last point is inadmissible arising the recent decision of the Privy Council reported in 6 M 75 L.J. 453.

3. The Mayor assumes that the remarks about Mr Nagappa was made when witness from that he was, that the remarks irrelevant— There is nothing in the complaint letter to support this assumption.

While, perhaps, it seem that the Mayor's view is incorrect, I do not think the proposed take the matter up the Privy Council since the Mayor does not appear to mean that members of the Committee cannot claim privilege in respect of the in camera evidence enquiry witness. Mr Nagappa may, if he chooses to do so, make this representation to Govt

We may submit Draft 19.1.29

Draft

Dagree

19-1-29

Govt Secy with Confidential

NOTE—Contn. Sheet.

SVD. 01714—GPB—30,000—18-4-28.

G. R. S. III—3]

ROUTINE NOTES. CB3035

[To be used only for notes, requisitions, etc., not intended for permanent record]

I attended the Court of the 1st. Class Bench of Magistrates today in obedience to the attached summons.

In the judicial enquiry of the accused (Mr. Abbas Khan), which I filed at a previous hearing, Mr. A. K. has stated in various places that he has spoken to certain things in Camera. I was asked if I remembered whether he gave spoke with regard to those matters or not. I said I cannot remember all that he said; I might remember some things and not others. Then Mr. Strachan, Counsel for Complainant, began to question me as regards each point specifically. I claimed privilege even to say whether he spoke on such matters or not. This was overruled by the Court. I requested permission to consult Govt. before answering any more questions & my examination was stopped.

I request I may be kindly instructed how to proceed in the matter.

The Court is also going to hear arguments as regards the privilege claimed by the Chief Secy. today. Perhaps it would be better if this

N. B. Should routine notes be written on small slips, the notes must be copied, or slips pasted on this form.

W D 1880—GPB—1,50,000—2 5-21

G. R. S. III—3]

ROUTINE. NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record]

Court is requested to intimate to Govt. the date when the arguments are to be heard so that the Govt. may be represented

Chief Secy

Ch
11.2.29

To Law — Sir, with compliments
for favour of perusal

Secy
11/2

1. The witness has cited Section 162 Evidence, and it would have been better if he had taken instructions before giving the evidence in Court.

2. In my Rajahmundry case, the City Magte has, in his order, conceded that it is the witness & not the Court which is competent to decide the question whether the public interest would suffer by the disclosure. The said Magte has also conceded that the objection of claiming privilege for the record of the inquiry will be defeated by

N. B. Should routine notes be written on small slips, the notes must be copied, or slips pasted on this form.

W D 1880—GPB—1,50,000—2 5-21

In the Court of The 1st Bench of Magistrate Bangalore City

C.C.No 243 of 1928-29.

WD 0505—GPB—1,40,000—5-10-28

ಸಾಕ್ಷಿಗಾರನ ಸಮ್ಮ
ಕ್ರಿ. ಪ್ರೊ. ಕೋಡ್ 68 ಮತ್ತು 252ನೆ
ಸೆಕ್ಷನ್‌ಗಳು.

ನಮೂನೆ ನಂಬರು ೧೫ ಕ್ರಿಮಿನಲ್

Compt :— Mr. D. Shama Rao

Accused :— Mr Mehmad Abbas Khan ಕೋರ್ಟ್‌ನಲ್ಲಿ

To Charles Naronah Esqr

Asst. Secretary to Govt of Mysore

Bangalore

CHIEF SECRETARY,
7 FEB. 1929

through, The Chief Secretary

to The Government of Mysore

Bangalore

ನಾನು ಈ ಕೆಳಗೆ ಸಹಿ ಮಾಡಿರುವ ನಾನು ಸರಿ

ತಕ್ಸೀರು ನಡಿಸಿದ್ದಕ್ಕಾಗಿ (ಅಥವಾ ನಡಿಸಿರುವುದಾಗಿ ಗುಮಾನುಪಟ್ಟ) ನಮ್ಮ ಮುಂದೆ ಫಿರ್ಯಾದು ಮಾಡಲ್ಪಟ್ಟು ನೀನು ಫಿರ್ಯಾದಿ ಯಾ ಆಪರಾಧಿ ತರಫಿನಲ್ಲಿ, ಮುಖ್ಯವಾದ ಸಾಕ್ಷ್ಯ ಬಹುಷಃ ಕೊಡುವಿ ಎಂತ ಕಂಡು ಬಂದದ್ದರಿಂದ

ಸದರಿ ಫಿರ್ಯಾದ ಸಂಗತಿ ಕುರಿತು ನಿನಗೆ ತಿಳಿದಂಥಾದ್ದನ್ನು ಸಾಕ್ಷ್ಯವಾಗಿ ಹೇಳುವದಕ್ಕೆ ಈ ಕೋರ್ಟು ಮುಂದೆ ಬರುವ ತಿಂಗಳು 11— 2- 1929 ತಾರೀಖಿನ ಪೂರ್ವಾಹ್ನ 11 ಘಂಟೆಗೆ ಹಾಜರಾಗಲಿಕ್ಕೂ ಮತ್ತು ಅಲ್ಲಿಂದ ಕೋರ್ಟಿನವರ ಅನುಮತಿ ಶಿವಾಯಿ ಹೊರಟು ಹೋಗದಹಾಗೂ ನಿನಗೆ ಇದರ ಮೂಲಕ ಸಮ್ಮ ಕೊಡೋಣಾಗಿರುತ್ತದೆ. ಮತ್ತು ನ್ಯಾಯವಾದ ಸಬಬ್ ಶಿವಾಯಿ ಸದರಿ ತಾರೀಖಿನಲ್ಲಿ ಹಾಜರಾಗಲಿಕ್ಕೆ ನಿರಾಕರಿಸಿದರೂ ಅಥವಾ ಅಶ್ರದ್ಧೆ ಮಾಡಿದರೂ ನಿನ್ನನ್ನು ಹಾಜರುಪಡಿಸಿಕೊಳ್ಳಲಿಕ್ಕೆ ಬಂದು ವಾರಂಟ್ ಕೊಡೋಣಾದೀತೆಂತ ನಿನ್ನನ್ನು ಇದರ ಮೂಲಕ ಎಚ್ಚರಿಸೋಣಾಗುತ್ತದೆ.

ತಾರೀಖು ಈ ೧೫ನೇ February 1929 ರಲ್ಲು ನಮ್ಮ ದಸ್ಕತ್ ಮತ್ತು ಕೋರ್ಟಿನ ಮೊಹರಿನಿಂದ ಕೊಡಲ್ಪಟ್ಟಿದೆ.

(ಮೊಹರ್.)

ಮ್ಯಾಜಿಸ್ಟ್ರೇಟ್.

ನೋಟ್—ಮೈಸೂರು ಸಂಸ್ಥಾನದ ಹೊರಗಿರುವ ಸಾಕ್ಷಿಗೆ ಈ ನಮೂನೆಯನ್ನು ಉಪಯೋಗಿಸಿದಲ್ಲಿ ಸಮ್ಮಗೆ ತಪ್ಪಿದರೆಸಾರಂತೆ ಹುಟ್ಟುವದಾಗಿರತಕ್ಕ ಖರ್ಚನ್ನೂ ಹೊಸದು ಹಾಕಿ ಜಾರಿಗೆ ಕಳುಹಿಸಬೇಕು.

ROUTINE NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record.]

allowing the complainant to be re-examined by examining the prisoner.

3. I am surprised to hear that the Remembrancer has taken or is about to take a contrary view on these points. The prisoner has evidently taken the responsibility of claiming to remember some of the statements, and it is this which has placed him in the awkward situation. In a settled case that the contents of a privileged document cannot be allowed to be proved by secondary evidence the defence cannot ought to raise objections on this ground, and the Magistrate ought to have warned the prosecution not to be allowed to be re-examined any evidence.

4. I may here repeat the cautions which I have

N. B. Should routine notes be written on small slips the notes must be copied, or slips pasted on this form.

G. R. S. III—3]

ROUTINE NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record.]

already noted in the
Rajendra case, viz:, that
it is quite possible that the
Parliament may make state-
ments, knowingly or unknowingly
quite contrary to the record
of enquiry. He may say so
many things which may not
be found in the record itself.
If such a result is produced
by the evidence which he
proposes to give, he may have
to accept responsibility in
the matter

5. The question arose of the Bench
may be in before me, and
hence the grounds on which
his view is based are not known.
I hear that the case is adjourned
to 10-morrow for argts. The
Pros may perhaps be
instructed to argue the point
on behalf of Govt.

10. m.
14/2

Chief Secy
with Compliments.

B.—Should routine notes be written on small slips the notes must be copied, or slips pasted on this form.

3031

G. R. S. III—3]

ROUTINE NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record.]

Subd for orders

D—M.

Orders 14/2

No matter was discussed with the Governor personally. He wanted to see the Govt's regarding privilege; and the file was subd to him this morning. Since it is understood that the same points are going to be argued to-day in the Court, it was considered desirable to watch the result & hence the Governor was pleased to order that no action was necessary at present.

D—M.
15/2/12

Chief Secy.
With compliments.

Seen
Neg
16/—

RP 1813

N. B. -Shouldroutine notes be written on small slips the notes must b cipoed, or slips pasted on this form.

D.O. No. D.

GOVERNMENT OF MYSORE

General and Revenue Secretariat,

Bangalore, ... *192*

Dear Sir,

With reference to your D.O. of this date, I write to inform you that the case has been adjourned to the 21st instant.

Yours sincerely,

To

P. Mahadevayya, Esq., B.A., B.L.,
Law Secretary to Government,

G. R. S. III—3]

ROUTINE NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record]

Dear Mr Nicholson

With reference to this
case to have been heard by
order of the City Magistrate
~~case to have been passed~~
~~by the City to~~ be
regarding the previous
claims by you on the
Defamation case against
Mr B. Nagabhushanam and are
directed to state whether
we must
may ~~apply for obtain~~
to proceed and apprise us
of the case will 2 or 3 weeks
be enable you to Conclude
the question of taking
action to the Chief Court after
obtaining a copy of the order
passed.

N. B. -Should routine notes be written on small slips the notes must be pasted, or slips pasted on this form.

IN THE COURT OF THE CITY MAGISTRATE, BANGALOR

Dated the 10th Day of January 1929.

Criminal Case No.266 of 1928-29.

Present:-

C.Narayanaswami Naidu, Esq., B.A.,B.L.,
City Magistrate, Bangalore.

Mr. L.S.Raju — Complainant.

Mr. B.Nagappa. — Accused.

Offence under Section 500 Indian Penal Code.

O R D E R

1. The case for the complainant is that Mr. Nagappa who was a member of the Bangalore Disturbances Enquiry Committee defamed him by making an irrelevant remark viz., "His (the complainant's) father is on his death-bed and this fellow is not going to his house even to see him", when the Committee was examining in Camera a certain witness, Mr. M.S.Linge Gowda.

2. The first witness examined by the complainant is Mr. C.Noronha, who was the Secretary of the Committee. When he was asked whether the accused made the remark complained of, he claimed privilege under Sections 123 and 124 of the Evidence Act and filed an affidavit. In the affidavit he states that the Chief Secretary to the Government directed him not to produce the minutes of the Proceedings of the Committee in Camera or to disclose the contents of the same.

3. The point to be decided is not about the witness being asked to produce the document referred to or his being permitted to give evidence derived from it. The witness admits in his evidence that he was present on 10-10-1928 when Mr. Linge Gowda was being examined in Camera by the Committee. He is asked to state what he directly heard Mr. Nagappa saying during the course of the examination of that witness. It is not known whether what

Mr. Nagappa said at the time was recorded or not. The witness refuses to answer the question put by the Court on the point. Granting that it was recorded, the witness did not derive his knowledge of it from the record. His knowledge is quite independent of it. He knew it before the record was made. It cannot, therefore, be considered that the evidence he is asked to give is derived from the record.

4. Again the minutes of the proceedings of the Committee can be reasonably expected to contain only the questions asked by the members of the Committee, answers given to them by witnesses and discussions and decisions of the Committee but not irrelevant remarks passed by the members. Mr. Noronha says that the stenographer had been directed not to note down irrelevant and cursory remarks made by the members of the Committee but sometimes he used to use his own discretion in the matter. If so, it is a matter for doubt whether the remark complained of was noted down by the Stenographer. One may reasonably expect, that even if he had noted it down, it was not allowed to form part of the minutes. Such irrelevant remarks if they were entered in the minutes were done so unauthorisedly and contrary to the instructions of the Chairman of the Committee. I doubt if these unauthorised entries can be considered to form part of unpublished official records relating to any affairs of State and if the circular issued by the Government in this connection was intended to cover them also.

5. The learned Counsel for the accused, Mr. Seshachar argued that in case the witness is allowed to give evidence of what he himself heard, he would be giving evidence of the contents of the document which is a privileged document and that the object of the privelege, namely, interests of the public would suffer thereby. The authorities quoted by him, viz., Hennessy vs Wright 21, Queen's Bench Division 509 (Law Reports 1888); Home vs Bentink, 129, English Reports (Common Pleas) 907 at 920 and Dawkins vs Lord Rokeby, 8 Q.B. 255 (1873 L.R.) lay down the principle on which the privilege

is allowed to be claimed. He is not able to quote any authority for the proposition that evidence not derived from but is independent of such record as is ontemplated by Section 123 should also be shut out. Even Wadeer (Rajah of Coorg vs East India Co., 20 Jur. 407 is not to the point. It was only laid down in that case that documents containing Political Communications should not be allowed to be produced and that the production of Political documents depended not on the question of the persons called on to produce them being a party to a suit or not but upon the danger to the public Interests which would result from their production.

6. Much was sought to be made of the sentence (in italics found at the bottom of page 450 of the Law of Evidence by Field, 7th Edition viz., "When the law is restrained by Public Policy from enforcing the production of the papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents." The same principle was laid down in 6 Mys. L.J. 453 at 456 and in 48 C. 304 at 318. This necessarily follows from the wording of the Section itself for secondary evidence is defined by Section 63 of the Evidence Act as evidence derived from documentary evidence. But evidence which is independent of the document cannot be said to be secondary.

(3) Evd includes oral evd. also See 3.

7. It is true that the object of claiming privilege for the document would be defeated by allowing such evidence to be adduced. But a Court of Law can only interpret the Law as it stands. If it were the intention of the Legislature to shut out evidence not derived from the document but at the same time would defeat the principle on which the privilege for the document is claimed, the word "derived" would not have been in the Section and one would expect the Section to be worded differently. I have to interpret the Section as it stands giving natural meaning to the words. I therefore hold that privilege cannot be claimed under Section 123 of the Evidence Act.

8. I shall now consider whether Section 124 would cover

the case. To bring it under the Section it must be shown that(1) the communication was made to a public officer (2) that it was made in official confidence and (3) that the Public Officer considers that the public interests would suffer by the disclosure of the communications.

9. The third point need not be discussed. I agree that the witness and not the court is the Judge to decide whether public interests would suffer by the disclosure (Vide 6 Mys L.J. 453)

10. Both the witness and Mr. Nagappa were public officers on 10th October 1928. But whther when they were deputed to work as the Secretary and a Member respectively of the Committee, they can be considered to be public officers, has to be decided. As in this case all the members of the Committee are summoned as witnesses I prefer to decide the point whether every member of the Committee can be regarded as a Public Officer.

11. The word Public Officer is not defined either in the Evidence Act or in the General Clauses Act. The definition of a Public Servant given in Section 21(6) of the Indian Penal Code may be taken as a guide. It is clear from the Notification issued by Government appointing the Committee (Exhibit P.1) that there was dispute between "Communities concerned" i.e., between Hindus and Muslims and the matter was referred by Government to the Committee for report. The members were appointed by Government. They are persons to whom the matter has been referred for report by Government. I would therefore hold that every member of the Committee must be considered as a Public Officer during its sittings.

12. The main point to be decided is whether the communication was made to a Public Officer in Official Confidence.

13. At this stage when the witness would not give information of what took place in Camera, I have to act on th allegations contained in the complaint petition. It cannot

be made out whether the remark which prima facie, is an irrelevant and unauthorised one, was meant to be communicated to the members of the Committee or to Mr. M.S.Linge Gowda who was being examined. May be, it was meant, as is alleged in the complaint petition, to give a suggestion to the witness and and lead him or was made with a view to elicit information from him. In either case, though it may be relevant, it was communicated to Mr. M.S.Linge Gowda who was not a public officer and as such Section 124 would be inapplicable. If it was meant for the members, it would be, unless circumstances are shown to justify it, an irrelevant remark, communicated both to the members of the Committee and M.S.Linge Gowda. Though it was meant for and communicated to the members of the Committee it was practically communicated to an outsider also.

This would not matter

Not Correct

14. I would therefore consider that the communication was not made in official confidence. The presence of Linge Gowda (which is not accidental) deprived the communication of its confidential nature. Mr. Seshachar is not able to find out any authority which shows that a communication made by one officer to another in the presence of a third persons, retains its confidencial nature. The case quoted by him, viz., 18 Bombay 263 was decided under Section 126 of the Evidence Act. In that Section the word "confidence" is not used. That decision does not therefore, help me in deciding a case coming under Section 124. No doubt the decision lays down that communications to be protected by Section 126 must be confidential. In that case three persons A, the client and B and C want to the office of the Solicitor who took down the statement of B in the course of and for the purpose of his professional employment, B was subsequently tried for defamation. It was held that the Solicitor cannot be permitted to disclose the matter in which his client employed.him. The point whether the presence of a third person deprived the privilege was not considered in the case. Th third person was evidently a friend of the client

15. The expression official confidence indicates exclusive confidence reposed by one officer in another. Both parties rely on 6 Mys. L.J.453 for the meaning of the words. This case follows the decision in 39 M. 304. It was laid down in these cases. The words "communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance , but includes generally all matters communicated by one officer to another in theperformance of their duties. The question whether such communication was made in the course of such performance is for the Court to decide." The learned Counsel, Mr. Seshachar lays emphasis on the words "special degree of secrecy" and urges that the presence of a third person would not deprive the officer to whom the communication has been made of the privilege. In my opinion the expression "degree of secrecy" does not mean absence of secrecy. There can be no secrecy when a communication is deliberately made in the presence of a third person. If Mr. Nagappa had waited till the witness withdrew and made the remark in the presence of the members of the Committee the case would certainly be covered by Section 124 even if the third person over-heard it casually and without his knowledge.

16. The point whether the communication was made by Mr. Nagappa in the discharge of his official duty has to be considered. Communications, though made to official persons are not privileged when they are not made in the discharge of any public duty (Vide Taylor on Evidence, 11th Edition para 948 and the Law of Evidence by Field page 451). It is for the court to decide whether such communication was made in the course of such performance (Vide 6 Mys. L.J. 453). Now the witness cannot say under what circumstances the remark was made without referring to the fact of the remark having been made. Evidence having been recorded in Camera no evidence can be adduced on the point before the decision is given. I have therefore to act at this stage on the allegations made in the complaint petition. The complainant was not being

examined at that time. The remark was not made according to the complainant for eliciting information and it was an irrelevant remark. It has been held in 62 I.C. 825 which has been followed by the Chief Court in 5 Mys. L.J. 202 that a Judicial officer who is holding a trial cannot be said to be acting in a Judicial Capacity if he abuses or defames a witness. In the present case, it is alleged that Mr. Nagappa defamed the complainant who was not even examined at the time. It is for Mr. Nagappa to place before the Court the circumstances justifying the making of the remark if, and when it is proved, that he made it prima facie, according to the allegations in the complaint petition, it is an irrelevant and defamatory remark and cannot therefore, be held to have been made in the discharge of official duty.

17. The remark cannot, in the absence of evidence, be held to have been conveyed to the members of the committee alone but not to Mr. Linge Gowda. It is alleged to have been made when Mr. Linge Gowda was being examined and knowing of his presence. It cannot be held under the circumstances now placed before the Court that it was made by Mr. Nagappa in the discharge of his duty as a public officer. I hold that the witness cannot claim privilege under Section 124 of the Evidence Act also.

18. I therefore direct the witness to give evidence without claiming privilege either under Section 123 or section 124 of the Evidence Act on matters which are within his knowledge but not derived from privileged record.

In open court.

10-1-1929.

(Sd) C.Narayanaswami Naidu,
City Magistrate.

Breast 1.568
Brain 8.96
Hair 13.573
Jaw 1.648
Field 128.774

3 qr

6. kg/j

Energy 22 to 395 J(K)

18, IVth Main Road, Chamarajpet,

Bangalore City,

15th January 1929.

Law 157-32-1

To

P. Mahadevayya, Esquire, B.A., B.L.,

Legal Remembrancer to

The Government of Mysore,

B A N G A L O R E.

Sir,

I have the honour to acknowledge receipt of your confidential D.O.No. 561/P dated 7th January 1929, D.O.No. P 3585 dated 10th instant enclosing Rs 10/- in currency notes for out of pocket expenses and D.O. No. 3614 dated 12th January 1929 asking for a copy of the complaint in C.C.No. 266 ~~dated~~ 1928-29 on the file of the City Magistrate, Bangalore, (Mr.L.S.Raju vs Mr. B.Nagappa).

In reply I beg to state that the point of privilege raised by Mr.Charles Norohna was argued by ~~the~~ me and a copy of the order passed against the claim of privilege is enclosed.

I am also enclosing a copy of the complaint petition of Mr.L.S. Raju.

The case stands adjourned to the 21st instant ~~the~~ within which time the City Magistrate expects a stay from the Chief Court or a final order either in confirmation or reversal of his order.

Awaiting your esteemed instructions,

I have the honour to be , Sir,

Your obedient servant,

C. Keshavaiya

D. O. No.

Office of the Secretary, Representative Assembly,

Bangalore, Dated 16 - 1 - 1929

Dear Mr Nadkarni.

Enclosed you will find a letter from Mr. Seshachar which will speak for itself.

The matter is urgent. I hope you will instruct Govt Advocate today to file the revision application & get the proceedings stayed. I hear that the Chairman of the Committee will be served with a notice from Madras - Unless early steps are taken to get the matter settled one way or the other, the situation becomes complicated.

Yours Sincerely

B. Nagappa

18, IVth Main Road, Chamarajpet,

Bangalore City,

15th January 1929.

Dear Mr.Nagappa,

As desired by the Legal Remembrancer to the Government of Mysore I am arranging to deliver to-day as early as practicable during office hours a copy of the order passed by the City Magistrate against the claim of privilege urged by the PW_1=Mr.Charles Norohna together with a copy of the complaint petition of Mr.L.S. Raju, Advocate against your good self.

The case stands adjourned to the 21st instant to continue the proceedings. In the meanwhile the Magistrate hinted that steps would be taken to get a revision to the ~~Chief~~ Chief Court and to have the proceedings stayed till the disposal of the petition. He also said that if an un-necessary delay is made he may be disinclined to grant an adjournment.

I shall be glad to have your inclination in the matter. I cannot know the views of the party who the question of privilege.

As I am likely to be absent from Bangalore from the 17th instant, I shall feel thankful to have a reply as conveniently as you can send.

Wishing the best of pongals,

Yours sincerely,

C. Keshava

B.Nagappa, Esquire,

Barrister-at-law,

Basavangudi, Bangalore City.

Cr. Rev 187-32-2

O P I N I O N.

In this case the magistrate discusses the applicability of Sections 123 and 124 of the Indian Evidence Act and holds that the privilege cannot be claimed under Section 123 or under Section 124. He, however, concedes in the order:--

(1) that it is the witness and not the Court which is competent to decide the question whether the public interests would suffer by the disclosure;

(2) that every member of the enquiry committee must be deemed to be a Public Officer according to the definition given in Section 21 Cl.(6) of the Indian Penal Code; and

(3) that the object of claiming privilege for the record of the enquiry will be defeated by allowing the complainant to let in oral evidence by examining Mr. Noronha.

2. It is ~~xxxxx~~ settled law that wherever matters of public policy are concerned the privilege is absolute and that no secondary evidence will be allowed and the following principle of law has been laid down by ~~xx~~ all standard writers:--

"When the law is restrained by public policy from enforcing the production of papers, the like interest restrains it from doing what would be the same thing in effect namely receiving secondary evidence of their contents." "Taylor on Evidence Vol. I page 648 Vide also Best on Evidence page 558. Fields' Indian Evidence Act page 774 and Indian Evidence Act by Amir Ali and Woodroffe p.896). This proposition is based on the authority of decided cases and it is not a mere opinion, and the magistrate has not correctly appreciated it. It has to be observed

magistrate fully quotes this principle of law in para 6 of the order and the only reason given by him not to act upon it is "that evidence which is independent of the document cannot be said to be secondary." Section 59 of the Indian Evidence Act provides that the contents of a document xhxxx be should be proved by the document itself and not by oral evidence. The reason why the contents of a document cannot be proved by oral evidence is that it is a cardinal rule, not one of technicality, but of substance which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. (Vide Field on Indian Evidence Act page 427 and Amir Ali and Woodroffe page 484.)

3. In the present case the primary evidence of the remark or statement said to have been made by Mr. Nagappa at the enquiry is said to be contained in the record and theø oral statement of a person who has heard it is evidently secondary. Hence, such oral evidence cannot be allowed as a substitute for the record.

In the case reported in 6 Mysore Law Journal page 453 the petitioner who had filed a suit against the Tumkur Municipal Council summoned both the President of the said council and the Secretary to Government Local and Legislative Departments. All letters and communications made by Municipal Council to Government and certain "To" and "From" registers had been summoned

to be produced. Both the President of the Municipal Council and the Secretary to Government claimed privilege under Section 124 of the Evidence Act. It was held, that the communications between the Municipal Council and the Government were primary evidence in the case, that they were in the custody of Government, that the Secretary to Government was entitled to withhold them, and that what the Secretary to Government was privileged to do could not be circumvented by calling for secondary evidence from the President of the Municipal Council. The reasons given by the magistrate in the present case are not convincing and his conclusion is not correct in view of his own admission that the object of claiming the privilege for the record would be defeated by allowing oral evidence to be adduced.

4. His decision that the privilege cannot be claimed under Section 124 of the Evidence Act is also not correct and the grounds given by him cannot be supported.

(a) In the first place he seems to find fault with Mr. Noronha for not furnishing information as to what took place in camera (Para 13 of the order). It has to be pointed out that the magistrate is not in order and he should not have asked any question on the said point before deciding the plea of privilege.

(b) In the next place he shows a certain amount of impatience and elects to act on the allegations of the complainant which he is not entitled to do. The said allegations have not reached the stage of evidence. They have not been tested by cross examination and have no

been proved, and there is no justification for the magistrate to use them against the accused.

(c) His reasoning in para 13 of the order is inconsistent. At one time he says that the alleged remark was irrelevant and unauthorised while at another time he assumes it to be relevant.

(d) Again, he holds that the said remark was communicated to Mr. M.S.Linge Gowda though there is no evidence to support such a conclusion. Mr. Linge Gowda was only present at the time of enquiry and there is nothing to show that the remark was really communicated to him as presumed by the magistrate.

5. The magistrate's decision is based on the argument that the communication was not made in official confidence. He himself states that the expression "official confidence" indicates exclusive confidence reposed by one officer in another, and that according to the decisions reported in 39 Madras 304 and 6 Mysore Law Journal 453 the words "communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance and that they include generally all matters communicated by one officer to another in the performance of their duties. It therefore seems to be clear from the above that 'Secrecy' ought not to be taken as a criterion to decide the question of privilege. The entire proceedings in camera including the discussions and statements made therein were confidential and Government have decided in G.O. dated 6th December 1928 that the minutes of the proceedings of the Committee in camera are privileged, being unpublished official records relating to the

Vol. I page 644.). Again a witness, whether a member of either House of Parliament or not, may refuse to disclose, without the permission of the House of Parliament what has taken place in either House or what was said, or how any person voted. (Vide Halisbury's Laws of England Vol. XIII page 573). The intentional introduction of newspaper reporters to a discussion with Cabinet Ministers, of matters of public interest, cannot deprive the occasion of its privileged character (Vide Empire Digest Vol. 22 page 395 (k).

7. The magistrate has, somehow, indulged in some unjustifiable remarks in his order. Although not a single witness has been examined, and although it has not yet been proved that the alleged remark was really made by Mr. Nagappa at the enquiry, the magistrate has jumped to the conclusion that the alleged remark was "irrelevant", "unauthorised" and even "defamatory". This conclusion ought to have been reached on the merits of the case after the adducing of evidence on both sides. Again, the magistrate assumes that the alleged communication was made by Mr. Nagappa and proceeds to discuss the question whether the said communication was made in the discharge of his official duty, although Mr. Nagappa himself has not yet raised this question for decision (Para 16 of the order). The magistrate, in considering this question, again finds fault with Mr. Noronha for his inability to state the circumstances under which the said remark was made, and again elects to act on the mere allegations made in the complaint petition. Without giving an

opportunity to the accused to raise this plea, if necessary, and without hearing the arguments of the accused in this respect, the magistrate has arrived at the conclusion that the remark was not made in the discharge of official duty. This procedure of the magistrate seems to be illegal and extraordinary. On these grounds, Mr. Nagappa has, perhaps, got a good case to get the case transferred from the file of the said magistrate, if he considers it necessary.

8. It is now a point for orders whether the magistrate's decision ought to be accepted as correct or whether the matter has to be taken to the Chief Court on the revision side. It is no doubt true that if the matter is taken to the Chief Court by the Government, an agitation will be started in the newspapers that the Government are identifying themselves with Mr. Nagappa and that they wish to get the order cancelled in order to support Mr. Nagappa. But if the order in question had affected only Mr. Nagappa's interests the matter might perhaps have been dropped. It seems to affect the interests of Government also and it is likely to have far-reaching consequences if the order is not set aside by the Chief Court. Because, the present case appears to have been brought to the court as a test case and the records of enquiry as well as Mr. Noronha seem to have been purposely summoned with a view to force a

decision at the hands of the magistrate on the question of privilege. If the order is allowed to stand as it is, it may embarrass Government in cases which may be filed in future and the intentions of Government in passing the G.O. dated 6th December 1928 may be frustrated. It is understood that the Chairman of the Enquiry Committee gave explicit assurances to the witnesses that they would be protected and that they would not be made to suffer for giving evidence in camera before the Committee. Government must be deemed to have acquiesced in the said assurances given by the Chairman, and if the magistrate's order is unchallenged there is nothing to prevent other parties from summoning Mr. Noronha to give oral evidence regarding the discussions among the members or other remarks made by them in the course of the enquiry, or regarding the statements made by witnesses, in which case the G.O. dated 6th December 1928 may practically become invalid.

9. There is another important aspect of the question which seems to deserve consideration. If Mr. Noronha is allowed give oral evidence in the present case or in future cases to be filed by the parties, it is quite possible that he may make statements, knowingly or unknowingly, quite contrary to the record of enquiry. In cross examination, which according to the recent Full Bench ruling of the Chief Court may extend even to matters which are not the

subject matter of the enquiry before court, he may say so many things opposed to what is contained in the record. This is exactly one of the reasons why the law excludes secondary evidence of the contents of a document.

10. Lastly, it is a defamation case and it is open to the parties to compromise the case at any time. If they do so, the order will be final and binding, and the magistrate himself will have no power to revise it even if he is convinced of its incorrectness.

11. Under the above circumstances, it appears to me that the matter deserves to be taken to the Chief Court on the revision side in the interests of Government.

P Mahadevayya
17.1.29

Serial No.

Copy of the order of the Bench of magistrates (First class), Bangalore city in Cr. Case No. 7-243 of 28-29 (Mr. D. Shamalla Vs. Mr. Abbas Khan).

Forwarded U.O. with Comments to the Govt Advocate for favour of opinion as to the correctness of the findings of the Bench of Magts.

B.C.
Mahadevappa
5.3.29

U.O. No. 19/28-29, dt. 22.3.29.

Returned with compliments, to the Secretary to Government, Law Department. My opinion, recorded on separate sheets of paper, is enclosed herewith.

Government Advocate
22/3/1929.

Read 5 P.M.
22/3/29

NOTE—Contn. sheet

WD 021—GPB—30,000—21-8-28

OPINION.

To attract the provisions of Sec.123 of the Evidence Act a document must be (1) an unpublished official record and (2) it must relate to any -- affairs of State. If it is such a document the opinion of the officer concerned is final on the question whether it should be disclosed or not. It is for the Court to consider the nature of the document and decide whether a particular document refers to any affairs of State or not. The Court has of course no right to inspect the document.

The Court i.e., the Bench of Magistrates concedes that the document in question is an unpublished official record. It also concedes that it is for the officer concerned to decide whether it shall be disclosed or not.

The question therefore for consideration is whether it relates to affairs of State.

The Court in its order on p.15 says 'there is reason for the court to believe that it relates to affairs of State'. This is apparently a -- mistake as this view is opposed to what the court says later on, that it is not a state document. It is just possible that the certified copy furnished by court is wrong.

The Committee who took the evidence was appointed by Government to enquire into the causes etc., of the Bangalore disturbances and to send their report to Government. The accused gave a

major

major portion of his evidence openly and also gave some evidence in camera. The evidence - given before the public is allowed to be disclosed and the Report of the Committee with the Government Order thereon has been published. The Report of the Committee presumably refers to the in-camera evidence also and comments on it.

The Court remarks that the in-camera evidence is alleged to contain some defamatory statements made by one private person against another private person and as such cannot relate to affairs of State. But the document may contain much more than that and the test adopted by the Court cannot therefore be a safe one.

P.18 to which the Court refers is not of much importance in this connection. It can only be an authority for the position that the minutes of the in-camera proceedings should not be disclosed in court. Even without P.18 the officer concerned was competent to say so and -- that would be conclusive. If P.18 purports to lay down anything higher than that it would be ultra vires and it could not, being an executive order, possibly supercede or control Sec.123 of the Evidence Act.

The Court may not also be correct when it says that the protection given by P.18 extends only to the minutes of the proceedings, and not to the statements of witnesses. Minutes of the

of the proceedings of the Committee must include also the statements of witnesses.

The decisions on the point are very few. In many cases the reports of Committees appointed by Government are held to be privileged documents. See also 48, Calcutta, 304 at page 318 where it was held that the minutes of the Champaran Agrarian Enquiry Committee appointed by the Government of Bihar and Orissa were held to be privileged under section 123 ~~I.P.C.~~.

See also Eng. Reports, Volume 129, page 907.

In 89 Indian Cases 387, (same case 1925 A. I. R., Oudh, page 540) a report was sent to the Inspector General of Prisons according to the Rules of the Jail Manual by a Magistrate who held the enquiry. When that was summoned to Court, privilege under section 123, Evidence Act was claimed. It was held that the privilege extended to the Report as well as to statements of witnesses incorporated in that Report.

8, Q. B., (1872-73) 255 is another case in point. A Court of Enquiry was constituted under the Military Law to enquire into the conduct of a Military Officer. The minutes of the Court of Enquiry which included the statements of witnesses were summoned in a later case for libel. It was held that they were privileged. That witnesses giving evidence had an absolute privilege was raised in the case and the

the decision to a large extent depended on that question. The question of absolute privilege does not arise in the present case. The reasoning of the learned Judges, however, is applicable to the case and particularly the observation that minutes of the proceedings include statements of witnesses, a point on which the Bench has gone wrong.

These cases are helpful though they cannot be said to be on all fours with the facts of the present case.

It is assumed that the Sir M. Visvesvaraya Committee was appointed according to law and that it was acting in an official capacity. Then an enquiry in connection with the questions referred to the Committee and particularly clause 4 of the reference may be taken to be an affair of State.

Odgers on Libel and Slander, 206.
Salmond's Jurisprudence. 139 and 140. } what are affairs of State are explained there

In the light of the finding of the Court that the records in question are unpublished official records and in the light of the observations above, there seem to be good grounds for the position that the documents in question relate to affairs of State.

Some cases take a contrary view, e.g., 16 C. W. N. 431. Statements made by witnesses in a departmental Police enquiry were held not to be privileged documents under sections 123

123 and 124 Evidence Act. The other cases referred to in the Judgment are not material to the case.

The Reports of Committees constituted by Government are held to be privileged documents. So also the statements of witnesses embodied in such Reports. In the present case the Report of the Committee is published by Government and the statements made by witnesses in the public enquiry have been allowed to be disclosed. Can privilege be claimed with respect to the statements made by witnesses in-camera mostly elaboratin what was stated in the public enquiry particularl when such evidence is presumably referred to in the Report itself ?. The statements made -- in-camera are continuations of those made in the open enquiry. Those portions for which privileg is claimed are, according to the Bench of Magistrates, alleged to contain defamatory statements made by a person who was not bound to give -- evidence before the Committee.

Whether the privilege if any that existed is lost by the publication of the Report by Govt. and by the disclosure of the statements made by the witnesses in open enquiry is another point to be considered in the light of a case reported in 6 Bom. Law Reporter p.131. The question in that case was whether a resolution of Government was a privileged document under Sec.123 Evidence Act. In the list of documents which was filed

filed in court on behalf of the Secretary of State, this document for which privilege was claimed was also mentioned. It was held that by relying on the document in their list Government had practically conceded permission.

The question is not free from doubt. But as has been suggested by the Bench of Magistrates what is wanted is the defamatory statements that have been made by the accused. As Government is not interested in this matter, and as the accused is the person that is aggrieved by the order of the Court, he may with propriety take the matter to a higher Court.

S. Nadarajah Iyer

Government Advocate.

O P I N I O N.

The Secretary to the Bangalore Disturbances Enquiry Committee has been summoned by the Court of the Bench of Magistrates, Bangalore, to produce the minutes of the examination of Mr. Abbas Khan, both in public and in Camera before the Committee. My opinion is asked as to whether the documents have to be produced by the Secretary.

Section 94 of the Code of Criminal Procedure gives the magistrate jurisdiction to issue a summons for the production of "any document or thing" if he considers it to be "necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the Code." As observed by Mr. Justice Ammerali in the case of H.H. the Nizam v Jacab (19 Cal. 52 at page 64), a magistrate under this section "cannot call for anything and everything from anybody and everybody. The thing called for must have some relation to or connection with the subject matter of the investigation or enquiry or throw some light on the proceeding, or supply some link in the chain of evidence". If once however the magistrate considers the document to be necessary or desirable, the power to summon is there, though ultimately it may prove to be wholly irrelevant to the enquiry. In this case the Bench of Magistrates have issued the summons in connection with the criminal complai for defamation filed by Mr. D.Shama Rao against Mr. Abbas Khan. And since it must be presumed that the Court issued the summons because it considered the document to be necessary or desirable for the purposes of the case before it, the power of the court to issue the summons cannot be questioned.

But clause 3 of Section 94 of the Criminal Procedure Code however leaves in tact the privileges given in sections 123 and 124 of the Evidence Act. The procedure to be adopted by a witness summoned to produce a document is that prescribed in Section 162 of the Evidence Act,

which makes it obligatory on the part of the witness to bring the document summoned to court notwithstanding any objection which there may be to its production or to its admissibility." The Section also gives exclusive jurisdiction to the Court to decide on the validity of such objection. The second para of the section enacts that "the court if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissability."

Section 123 prohibits the giving of any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The combined operation of these two sections is that the person in custody of what he considers to be a privileged State document, must bring it with him to Court, that the latter may decide whether it is a document of that character or not. The Court cannot however have an inspection of the document though it mat take other evidence to enable it to determine its admissability. This other evidence can relate only to those facts touching the document which in the opinion of the officer concerned show that it is one coming within the purview of Section 123. The court is bound by the officer's statement and has to determine whether those facts do or do not give the document the character ~~xxxxxx~~ claimed for it. It cannot receive secondary evidence of the contents of the document, because when the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely receiving secondary evidence of their contents. (Field's Law of Evidence 8th Edn. page 774; Raja of Coorg v East India Co., 25 L.J. (Ch.) 345). And once the court decides that it is a State document, then it is for the head of the department concerned to determine whether eviden

of it shall be given or withheld (Woodrofee and Ameerali's Evidence Act 8th Edn. pages 997-998).

If therefore the documents now summoned by the Bench of Magistrates are shown to be State documents or in the words of Section 123, unpublished official records relating to any affairs of State" then it is the head of the department--in this case the Government that has to decide whether evidence can be given or not. Since it is clearly not in the public interests to disclose the deposition of witness examined by the Committee in Camera, I am of opinion that the Government has to withhold permission and the Secretary can appear in Court and state that he claims privilege under Section 123 of the Evidence Act.

Now I shall consider the question whether the document summoned come under Section 123 of the Evidence. Three conditions are necessary for this; viz.,

(1) It must be an official record

(2) It must still be unpublished

& (3) it must relate to affairs of State.

All records of or pertaining to an office are official records. And all records made by or under the direction or authority of public servants in the discharge of their duties are official records. Now the term public servant is defined in section 21 of the Penal Code. Under Clause 6 of that Section "every arbitrator or other person to whom any cause or matter has been referred for decision or report by any court of justice or by any other competent authority" is a public servant. Since the members of the Committee have been appointed by Government to report on the matters referred to them, it is clear that they are public servants and the records of the proceedings of the Committee are therefore official records. And that these records are yet unpublished is manifest.

Now to understand whether these unpublished records relate to any affairs of State, it is necessary to have a

clear view of the formation of the committee and the function assigned to it. The Committee was appointed under G.O.No.1042-1102 C.B.38-28-114 dated 28th August 1928 and the terms of reference are:--

(1) To ascertain the root causes and course of events that led to the disturbances;

(2) To investigate the special causes or influences, if any, which were at work at the time and which led to su such unusual events;

(3) To examine the steps taken by the local officers to cope with the situation; and

(4) To suggest any future measures necessary to remove misunderstandings and restore good feeling and harmony among the various communities concorned.

The two essential functions of a State are defence against external enemies and the maintenance of peaceable and orderly relations within the community itself (Salmond on Jurisprudence page 139) It is therefore essentially the duty of the State to enquire into the causes of the disturbances and to adopt measures for the welfare and safety of its members. Tnis duty of enquiry is delegated to the Committee and as such it performs one of the essential State functions. In Odger's Libel and Slander page 20 affairs of State are this enumerated "The conduct of all public servants, the policy of the Government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Parliament, the adjustment and collection of taxes and all other matters, which touch the public welfare." In Jehangir v Secretary of State (27 Bombay 189 at page 216) Mr. Justice Tyabji observes:--

"The cases of Dawkins vs Panlet, Dawkins v Rokeby, Hemessey v Wright, Grant v Secretary of State, Chatterton v Secretary of State, Oliver v Bentick, lay down very broadly that all communications between Ministers and of State with regard to public matters or public functions and all expressions of opinion on the conduct of public

duties by the officers of the State and all records and documents in which the opinions or orders of public ~~offic~~ officers relating to other public officers are contained are absolutely privileged and that they are privileged to such an extent that they cannot be compelled to be produced and that even if the defendant or any party in whose possession that document may be is willing to produce it, the court ought not to notice it and ought not to allow that document to be put in or produced. They further lay down that if prima facie the document is privileged, if prima facie it purports to be an official communication which would be privileged, then no allegation of malice would be allowed and no proof of malice will take away the privilege.

The English law on the subject is the same as that laid down in Sections 123 and 124 of the Evidence Act with the difference that even in cases coming under Section 124, the court in England cannot have an inspection of the document itself to determine whether it is privileged or not.

In the important case of Home v Bentick 129 E.R.907, the Commander in Chief of the Army having directed an assemblage of commisioned military officers to hold an enquiry into the conduct of Home who having sued the President of the inquiry for a libel, it was held by Dalli C.J. that the report was a privileged communication and that it was properly rejected as evidence at the trial. This case was examined in that of Hemessy v Wright (21 Q.B.D. 509) and approved. In this case the minutes of The Royal Commissioners appointed by Her Majesty to inquire into the affairs of Mauritus, were rejected as pertaining to affairs of State and thus privileged. In Dawkin's v Rokeby (1873 L.R. 8 Q.B. 255 affirmed in 1875 7 H.L.744) it was held that statements made by an officer summoned to attend to give evidence before a court of inquiry, instituted by the Commander in Chief of the

Army, are part of the Minutes of the proceedings which when reporte. and delivered to the Commander in Chief are received and held by him on behalf of the Sovereign and on grounds of public policy cannot be produced in evidence. I may refer to a very analogous case reported in 48 Cal. 304 (Same case 63 I.C. 467) decided by Sir Ashutosh Mookerjee Acting C.J. and Mr. Justice Chaudhari. It arose out of a libel actio.. brought by one of the members of the Champaran Agrarian Enquiry Committee appointed by the Government of Behar and Orissa, against a witness who afterwards published defamatory articles in the newspaper against the member. During the course of the trial, the defendant tried to compel the production of the minutes of the committee. This was unsuccessful for the Government of Bihar and Orissa decided that it related to affairs of State. Mr. Justice Mookerjee observes:-- "It has been contended before us that the papers mentioned did not fall within the description; but it is fairly clear from the language of the section that the court cannot be invited to discuss the nature of the document. The Public officer concerned and not the Judge is to decide whether the evidence referred to shall be given or withheld. If any other view were taken, the mischief intended to be averted would take place as the Judge could not determine the question without ascertaining the contents of the document and such enquiry if it did take place, must for obvious reasons take place in public. (Beatson v Rkeene, Hennesse v Wright, Jehangir v Secretary of State). The result practically is that if the objection is raised by the proper authority, the Court cannot compel disclosures either by primary or secondary evidence."

Under these circumstances, I am of opinion that all the conditions required in Section 123 are present and as such the documents summoned are absolutely privileged and no action can lie on them. I would advise Government to pass an order holding that the minutes of the proceedings

of the committee form part of the unpublished records relating to affairs to State and thus refuse permission to produce them in court.

(Sd) B. Nagappa,
27.11.1928.
Legal Remembrancer.

Government of his highness the Maharaja of Mysore.

GENERAL AND REVENUE DEPARTMENTS.

G. O. No. 2781-3—C. B. 38-28-305, dated 6th December 1928.

In Camera **Proceedings of the Bangalore Disturbances Inquiry Committee.**

Passes orders prohibiting the production of any evidence derived from the minutes of the —— before a Court of Law.

READ—

Letter No. E. 828, dated the 30th November 1928, from the Secretary, Bangalore Disturbances Inquiry Committee, stating that a summons has been received from the Chairman of the First Class Bench of Magistrates, Bangalore City, for the production of certain evidence taken *in camera* by the Committee and requesting that exemption may be obtained from producing such documents as the proceedings of the Committee, inclusive of the examination of the witnesses, fall within the purview of Section 123 of the Indian Evidence Act.

ORDER NO. 2781-3—C. B. 38-28-305, DATED 6TH DECEMBER 1928.

The minutes of the proceedings of the Committee *in camera* being unpublished official records relating to affairs of State, Government have decided not to permit any evidence derived therefrom being given in a Court of Law.

N. MADHAVA RAO,
Chief Secretary to Government.

To—The Secretary, Bangalore Disturbances Inquiry Committee.
The District Magistrate, Bangalore District.

Exd.—P. S. R. N.

W D 2113—GPB—330—1-3-29

G. R. S. III—3]

ROUTINE NOTES.

[To be used only for notes, requisitions, etc., not intended for permanent record.]

"PRIVILEGED" DOCUMENT

In Camera Evidence

ORDER IN BANGALORE DEFAMATION CASE

("Swarajya" Correspondent)

BANGALORE, July. 15.

The District Judge, Mr. Sreenivasaraghavachar pronounced orders today in the defamation case filed by Mr. B. K. Garudachar against Mr. Abbas Khan, holding that the in-camara evidence was a "privileged" document.

Arguments were heard on Saturday last as to whether in-camera evidence was a "privileged" document or not.

In the course of the order extending over six pages of type-written matter, the District Judge observes:—

"Since under Exhibit B, the Government have declared that the minutes of the proceedings of the Visvesswarayya Commitee which, I hold, include, the statements of witnesses made in-camera is an unpublished official record relating to affairs of state, I am of opinion that it is privileged within the meaning of Section 123 of Evidence Act. and the complainant has no power to compel the production of such documents. In the result, I uphold the objection of the Government Advocate and allow the claim of privilege put forward by the Chief Secretary."

N. B.—Shouldroutine notes be written on small slips
2the notes must b cipoed, or slips pasted or
this form.

Question of privilege, Sections 123 and 124, Evidence Act

Moreover, all writers of confidential official communications are protected by a privilege of a different kind, which does not indeed in terms cover their liability, but makes it practically impossible to prove a case against them. The production of such documents will not be permitted in Courts of Justice, both because State secrets may be thereby disclosed, and because it is desirable that public servants should be able to write freely on matters affecting the public service without exposing themselves to the fear of actions. It is sufficient if the official who has the supreme control of the documents object to their production on the ground of public interest, but even without such objection the Court in fitting cases will act on its own responsibility.

Edwards v. Lindsell on Torts
p. 529 (8th Ed.)

(21.6.29)

General and Revenue Secretariat. | File No. of 192 .

Serial No.

S. 123 Evidence Act

No is the person or who the person who has to decide whether the evidence shall be given or withheld.

48 Cal. 304
= A.I.R. 1921 Cal. 282

S. 124 Evidence Act.

The object of S. 124 evidence is to prevent disclosures to the detriment of public interests & the decision as to such detriment rests with the officer to whom the communication is made

I.L.R. 39 Mad. 304

The words of the section include all matters communicated by one officers to another in the performance of their duties. " " at p. 311

Ss Evidence Act by Basanandam academy 28) p. 657.

NOTE—Contn. Sheet.

WD 01714—GPB—30,000—18-4-28

D. O. No. 1

Encl.

RD-9-7-29

GOVERNMENT ADVOCATE'S CHAMBERS,
PUBLIC OFFICES,
Bangalore, 8th July 1929.

9/7

Dear Sir,

With reference to your D. O. letter No. 14/P., dated the 3rd July 1929, I am returning herewith, as desired, the certified copy of the order passed by the First Class Bench of Magistrates, Bangalore, in Criminal Case No. F.243 of 1928-29 on their file. (Mr. D. Shama Rao, VERSUS. Mr. Abbas Khan).

Yours sincerely,

K. Ramachandra Rao

P. Mahadevayya, Esq., B.A., B.L.,
Secretary to Government, Law Deptt.,
Bangalore.

TWO ANNAS
MYSORE
ಎರಡು ಆಣ

In The Court of the First Class Bench of Magistrate Bangalore City.

Criminal Case No. 7 – 243 of 1928-1929

Present:- Messrs S. Reubean B.A.
Chairman.
N. Venkata Rao.
K. Narasimhiah } Collegues.

Complainant Accused

Mr. D. Shama Rao & Mr. Mohomad Abbas Khan

(Order passed on 1st March 1929)

In this Case The Chief Secretary (Mr. N. Madhava Rao) was Summoned to appear with The in-camera evidence of the accused before the Bangalore disturbances Inquiry Committee and to give evidence, and Mr. C. Noronha

TWO ANNAS
ಎರಡು ಆಣೆ
MYSORE

- was also summoned as a witness.

During the examination of the Chief Secretary, he said that he had not produced the in-camera evidence of the accused as required and that he claimed privilege in respect of the said document, under the Government order exhibit P18 and Section 123 Indian Evidence Act. Mr. Noronha who was the Secretary of the Bangalore disturbances Inquiry Committee, while being examined claimed privilege under Section 124 Indian Evidence Act, re the question put to him with regard to what he had heard when the accused had given evidence in-

TWO ANNAS
GOVT OF MYSORE
ಎರಡು ಆಣೆ

camera before the said Committee
Thus the following two questions
arose fore the ruling of the
Court-

(1) whether the privilege claimed
by the Chief Secretary re- the
in- camera evidence given by the
accused before the Bangalore
Disturbances Inquiry Committee
under the Government order exhibit
P18 and Section 123 Indian
Evidence Act is valid an in-
consonance with the provisions
of the Indian Evidence Act, and

(2) whether the privilege
claimed by the witness Mr. C.
Noronha Prosecution witness 2,
under Sections 123 and 124

TWO ANNAS
GOVT OF MYSORE
ಎರಡು ಆಣೆ

Indian Evidence Act with regard to the questions put to him as to what the accused had stated in his in-camera evidence before the Bangalore disturbances Inquiry Committee, regarding the Complainant, The Conspiracy and The so called Conspiralors, is valid and in consonance with the provisions of the Indian Evidence Act.

These two points were argued by Mr. Seshachar for the Complainant, against the privilege claimed and by Mr. A. T. Khaleel for the accused in favour of the privileges claimed, and both side cited a number of authorities

TWO ANNAS
MYSORE
ಎರಡು ಆಣೆ

touching the points.

Arguments by Dr. Seshachar against the privileges claimed is short are that the Committee, composed of seven members could have themselves, decided, when Summons were issued from this Court, for the production of the in-camera evidence, that the documents in question fall under Section 123 Indian Evidence Act instead of going to the Government for protection, that the statement of the accused in-camera was not an affair of state, that the Committee did so with the object of preventing the evidence seeing the light of

Page 6

~~the~~ 6th day, that exhibit P/8 makes mention of the "minutes of the proceedings of the Committee in-camera" which is not what the prosecution requires, that the prosecution wants the evidence of the accused in-camera before the Committee, that the Government order Exhibit P/8 does not include the evidence in-camera that the Government order Exhibit P/8 is an executive order of the Government, cannot over-ride the law and is not binding on the Courts of justice and that no declaration was made by the Government prosecuting witnesses giving evidence before the Committee

TWO ANNAS ಎರಡು ಆಣೆ MYSORE

and witnesses were not Compelled to make Statements

Mr. Seshachar referred to Bombay Law Reports Volume VI pages 131, 132 Indian Law Reports Volume II page 329, Indian Law Report 18, page 318, The Law Report 1928 Volume I K.B. and P. Part I, The Indian Law Report Volume 44 page 365.

Mr. A.J. Khaleel for the accused argued that Sections 123 and 124 are conclusive and imparative that Section 94 (3) Criminal Procedure Code restricts the Courts power to send for any document, that the Government was right in saying that in the larger interests of the.

TWO ANNAS
GOVT OF MYSORE
ಎರಡು ಆಣೆ

Community, They would not give the said evidence, that under Section 121 Indian Penal Code The members of the Committee were public Servants and the record made by them were official records, that they did not become State papers only after the Summonses were issued, but to start with they were official records. He also cited authorities to support his contention. Such as the Indian Law Report, Calcutta volume XIV pages 52 to 64, 48 Calcutta page 318 Indian Cases Volume 8 & page 387, English Reports 129 page 107, 8 Queens Bench page 255, Edgers

TWO ANNAS ಎರಡು ಆಣ್ಣೆ GOVT OF MYSORE

on Libel and Slanders. & ½

We have carefully perused all the authorities quoted on both sides and have also read the Sections referred to. What is required by the Complainant is the in-camera evidence given by the accused before the Committee, as he believes that the accused has there-in made certain & Statements which are defamatory of the Complainant. The question now is whether the in-camera evidence of the accused is an unpublished Official record relating to affairs of State, so as to fall under Section 123 Indian Evidence Act. As far as the point whether it is an

TWO ANNAS
MYSORE
ಎರಡು ಆಣೆ

unpublished official record is concerned we do concede the points and say that it is so. But the point for consideration is whether it relates to affairs of State.

From the Section 123 Indian Evidence Act and the authorities quoted thereon, we find that the head of the Department in which the document is kept is the sole judge as to whether a disclosure will or will not be prejudicial to public interest and his decision is inconclusive. But we have to read Sections 123 and 124 along with Section 162 Indian Evidence Act. It is laid down

TWO ANNAS MYSORE ಎರಡು ಆಣೆ

in Woodroffe on Evidence on page 914 that "The person in custody of what he considers a privileged State document must bring it with him to Court, that the latter may decide whether it is a document of that character or not. The position of the words "unless it refers to matters of State" in the 2nd paragraph of the Section (162 Indian Evidence Act) appears to show that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it to determine on its admissibility. Apparently upon the objection and the Statement

TWO ANNAS
MYSORE
ಎರಡು ಆಣೆ

of the person appearing with the document, the Court will determine whether it is or is not a State document. If the Court decides that it is a State document, then it is for the head of the Department alone to determine whether it shall be given or not. It has been said that in the case of State proceedings the Court cannot inspect them for the purpose of seeing if they are privileged and must take their character upon the word of the public officer, who has them in his custody. But by this it is conceived, is meant that the officer states those facts

TWO ANNAS
ಎರಡು ಆಣೆ
MYSORE

touching the document which in his opinion show that it is one coming within the purview of Section 123 Indian Evidence Act, and the Court then (though bound by the officer's Statement and forbiddens to inspect the document) determines whether those facts do or do not give the document the character claimed for it. Other-wise it does not appear that there is any function assigned to the Court or that there is any reason why such a document is required to be produced in Court unless if be that the Officer may publicly and in the presence

TWO ANNAS ಎರಡು ಆಣ್ಣೆ MYSORE

Of the judge claim privilege from production.

Thus the result of Sections 123 and 124 Indian Evidence Act read with Section 162 Indian Evidence Act is that Sections 123 and 124 Indian Evidence Act are not conclusive and imperative. The Court has power to decide, without inspecting document but with any other evidence whether the document is a State document, privileged under Section 123 Indian Evidence Act. Now in-camera evidence given by the accused is in fact a State document made by a private person and is alleged to

TWO ANNAS
GOVT OF MYSORE
ಎರಡು ಆಣೆ

Page 15

Contain some defamatory statements about another private person, and as such there is reason for the court to believe that it relates to affairs of State. The Government order Exhibit P18, we must say, strengthens this view. In the preamble it will be seen that a reference was made by the Committee to the Government on receipt of the Summons from this Court, for the production of this document, re questioning that exemption may be obtained from producing such statements, as the proceedings of the Committee inclusive of the examination of

TWO ANNAS
GOVT OF MYSORE
ಎರಡು ಆಣೆ

witnesses fall within the perview of Section 123 Indian Evidence Act. But the Government order Exhibit P18 makes mention of only the minutes of the proceedings of the committee in-camera, being unpublished official records relating to affairs of state.

The Government order Exhibit P18 is an order of the Government in its executive capacity and as such cannot form a legal liability and is not binding on courts of justice. But we see that the privilege is claimed under Section 123 Indian Evidence Act, on the

TWO ANNAS ಎರಡು ಆಣ MYSORE

Ground that the document is an official record relating to affairs of State. If the document had the intrinsic quality of being unpublished official record relating to affairs of State, we do not see the necessity of the committee seeking the protection of the Government. Then the committee, wanted the proceedings of the committee, inclusive of the examination of witnesses to be protected, which means that the committee wanted the whole of the proceedings inclusive of the examination of witnesses, whether in public or in-camera, to be protected, but the Government in

TWO ANNAS
MYSORE
ಎರಡು. ಆಣೆ

their order exhibit P/8, only refer to the minutes of the proceedings of the Committee in-camera. The minutes of the proceedings of the Committee, whether in public or in-camera, are not what are required now. The question is about the in-camera evidence given by the accused before the Committee. A referen to the preamble of the Government order exhibit P/8 will show that the Committee wanted the whole of the examination of witnesses whether in public or in-camera to be protected. But we find that no privilege has been claimed for the evidence of the accused

given in public and we fail to see how the privilege claimed for his in-camera evidence can be valid and in consonance with the law.

As stated above we hold that the evidence given by the accused in-camera before the Committee, cannot be considered to relate to affairs of State. It is only a statement given by one individual in which he is alleged to have made some defamatory statements about another private individual. Besides there is nothing to show that any special protection was given by the Government to witnesses for the purpose.

TWO ANNAS

GOVT OF MYSORE

ಎರಡು ಆಣೆ

Page 20

Taking into consideration the above facts we hold on the point that the in-camera evia given by the accused befor the Bangalore Disturbances Enquiry Committee is not a document relating to affa of State and is therefore no privileged under Section 12 Indian Evidence Act.

After holding as above o The I st. point, we are justif in holding that the privilege claimed by the witness Mr. C. No Prosecution witness 2 with re to the questions put to him as what the accused, had within hearing, stated in his in-Came

TWO ANNAS ಎರಡು ಆಣ್ಣೆ GOVT OF MYSORE

evidence before the Comm^e Tee, is also not valid and not in consonance with the provisions of the Indian Evidence Act. Besides they cannot be considered to be communications made to him in official confidence. It may be that as Secretary, he was bound to be present when witnesses were being examined before the Committee. But as we hold that the in-camera evidence itself is not privileged under Section 123 Indian Evidence Act, we hold that the witness Prosecution witness-2 cannot claim privilege under Section 124 Indian Evidence Act as regards the questions put to.

TWO ANNAS

GOVERNMENT OF MYSORE

ಎರಡು ಆಣೆ

Page 22

hm.

1-3-1929.

sd/- S. Reubeau
Chairman.

sd/- N. Venkata Rao
Colleque

"Boo

sd/- S. K. Narasimahiah
Colleque

copy.

Head Clerk

Copy applied for on the	Applicant told to appear on the	Applicant appeared on the	Copying stopped for want of copying sheets on the	Additional copying sheets supplied on
2-3-29	4-3-29	5-3-29	—	—

Copy ready on the	Copy delivered on the	Copied by	Examined by
4-3-29	5-3-1929	M. Thirumalai Rao	[illegible]